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IN THE

Supreme Court of the United States

October Term, 1957
No. 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

On March 17, 1958, after hearing this case on the merits, the Court entered a *per curiam* order affirming the judgment below by an equally divided vote. Mr. Justice Douglas did not participate.

This petition for rehearing is filed, not to reargue the merits of the case, but to suggest that another, more constructive, disposition of the matter may be open to the Court. This case ultimately involves two distinct questions—one of law and one of fact. The legal question relates to the proper standards to be applied in testing the infringement of a copyrighted work by any parody or burlesque: whether, as held by the courts below, the art of parody must be treated as a species of plagiarism and

its practitioners limited to the use of only such insubstantial copyrighted matter as is permitted the literary thief, or whether, as contended by petitioners, the parodist has at least some right to use matters of substance under the doctrine of fair use. The factual question is whether, tested by the correct legal standard, this particular parody, "Autolite," infringed this particular copyrighted work, "Gaslight."

It does not appear from the action of the Court whether the equal division of the Justices was upon the issue of law or upon the issue of fact. It is possible, we believe, that there may have been a majority for a particular decision on the issue of law. For instance, a majority may have concluded that parody should not be limited to an insubstantial use of copyrighted material but rather is entitled to the full benefit of the doctrine of fair use. The equal division may have been attributable solely to the issue of fact.

If this be the case, we suggest that it would not be improper—indeed it would be consistent with the usual practice—if the Court would render an opinion on the law, leaving to the trial court its customary task of applying that law to the facts, including the duty of selecting between such conflicting inferences as may be drawn from the evidence. See *Marconi Wireless Telegraph Co. of America v. Simon*, 246 U. S. 46; *Universal Camera Corp. v. Labor Board*, 340 U. S. 474; *Rayonier, Inc. v. United States*, 352 U. S. 315. In short, if a majority of the Court is in agreement on the important question of law presented here, those views could be announced and the case remanded to the trial court for consideration in light of the applicable legal principle.

We suggest the possibility of such a disposition because of the importance of a determination of the legal question. That substantial public benefit was to be expected from the anticipated authoritative determination of this legal issue has been expressed not only by legal commentators[1] and spokesmen for the particular industries involved,[2] but by those primarily interested in the advancement of literature and the arts.[3] That issue is now "left unresolved." *Cf. Peters v. Hobby*, 349 U. S. 331, 333 (1955).

While this Court's affirmance technically may not be authority for determination of cases in other circuits, nevertheless the harsh and constricting rule of law enunciated by the court below will be binding in the Ninth Circuit, where a great bulk of the cases involving this issue may be expected to arise.[4] Furthermore, as has so aptly been said, the silence of this Court may itself "chill the warmth of parody's laughter at a time when we seem to need it the most."[5]

For these reasons petitioners request that a rehearing be granted for the purpose of rendering an opinion which will enunciate the principles of law applicable in this

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[1]See *e.g.* "Parody of Copyrighted Works; Death of an Art Form?" 4 Wayne L. Rev. 49 (1957).

[2]See *e.g.* Sponsor Magazine, February 15, 1958, page 36.

[3]Charles Poore, "Ardent Plea for the Art of Parody," New York Times Supplement, March 9, 1958.

[4]*Cf., Bailey v. Richardson*, 182 F. 2d 46 (1950), affirmed by an equally divided Court, 341 U. S. 918 (1951), followed in *Haynes v. Thomas*, 232 F. 2d 688, 690 (1956); *Kutcher v. Gray*, 199 F. 2d 783, 789 (1952).

[5]Charles Poore, "Books of the Times," New York Times, March 20, 1958. See also Time Magazine, March 31, 1958, p. 40.

field, vacating the judgment below, and remanding the case to the trial court.

Respectfully submitted,

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March, 1958.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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